

# **Waterway and Wetland Handbook**

## **CHAPTER 50**

### **ENFORCEMENT**

#### **GUIDANCE PURPOSE AND DISCLAIMER**

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#### **PURPOSE**

The Department is responsible for the administration and enforcement of Chapters 30 and 31 of the statutes. The Department administers these statutes to protect the public interest and to preserve Wisconsin waterways. It is the Department's duty to ensure the rights of all Wisconsin citizens to fairly and safely use and enjoy these resources. The main purpose of enforcement is to restore damaged waterways, secure fines or forfeitures for unauthorized work and to highlight the Department's permit and approval program.

#### **MECHANISM**

The Department has several alternative enforcement tools to handle violations of water law or violations of permits and orders.

Enforcement can proceed through the local courts, prosecuted by the District Attorney or the Attorney General's Office, or through an administrative hearing.

#### **HISTORY**

Early in our state's history there were no regulatory agencies responsible for enforcing the "water laws" existing at that time. Enforcement actions were carried out only upon complaint of injured parties through the courts. Literally hundreds of Supreme Court decisions were rendered as a result of those complaints. It is interesting that the first law prohibiting obstructions in navigable streams (Act No. 9, Territorial Laws of 1841) remains essentially the same today as subs. 30.10(2), Wis. Stats. Act No. 9 declared, "All rivers and streams of water in this territory in all places where the same have been meandered and returned as navigable by the surveyors employed by the United States Government are hereby declared navigable to such an extent, that no dam, bridge, or other obstruction may be made in or over the same without the permission of the legislature." This provision

was incorporated into the Revised Statutes of 1849 as section 1, Chapter 34. Chapter 72, Laws of 1853, amended section 1 by adding "providing that nothing herein contained shall be construed so as to affect any act now in force granting to towns or county boards of supervisors the power to erect or authorize the construction of bridges across such streams." This provision was changed to section 2, Chapter 41, Revised Statutes of 1858; remained as section 2, Chapter 41, Revised Statutes of 1871; and was changed to section 1596, Chapter 70, Revised Statutes of 1878. Although it was modified somewhat, it appeared as section 1596, Chapter 70, Revised Statutes of 1898.

Another early statute prohibiting obstructions was section 97, Chapter 16 of the Revised Statutes of 1849. This provision was contained in the "Highway and Bridge" statutes until 1878, when it was revised and placed as section 1598 in Chapter 70 of the statutes entitled "Rivers and Float." Initially, this section provided that: "Whoever shall obstruct the navigation of any river or stream which now is, or may hereafter be made navigable, by falling any tree therein or putting into any river or stream declared a public highway, any refuse lumber, slabs, or other waste materials, on conviction thereof shall forfeit the sum of 5 dollars for any such offense, and shall be further liable for all damages that may accrue on account of such obstruction."

The revisors, in 1878, substantially modified this provision to read: "Every person who shall obstruct any navigable stream in any manner so as to impair the free navigation thereof, or place in such stream or any tributary thereof any substance whatever, so that the same may float in or into, and obstruct any such stream or impede its free navigation or construct or maintain, or aid in the construction or maintenance of, any boom not authorized by law, in any such navigable stream," (the boom provision was added by Chapter 123, Laws of 1886) "shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such boom, twenty-five dollars; one half to be paid to the informer." Note that obstructing a stream "in any manner" was an addition to the original purpose of prosecuting for the placement of refuse lumber, etc. The Supreme Court commented on this section in A.C. Conn Co. vs. Little Suamico Lumber Mfg. Co., 74 Wis. 652 (1889). It said, "This plainly implies that an obstruction in a navigable stream which does not impair the free navigation thereof, though not authorized by law, is not a nuisance and unlawful."

Chapter 413, Laws of 1901, modified this provision to the extent that there would be no forfeiture for navigating streams with logs or using temporary booms for that purpose.

The above provisions appear today in section 30.15, Wis. Stats.

Chapter 62, Laws of 1849, was a partial forerunner of section 31.25, Wis. Stats., and currently appears as s. 3126. Under this law, owners of dams on the Wisconsin or Black Rivers on their navigable tributaries were required to provide slides and chutes for the passage of floating logs (ss. 1601 and 1602, R.S., 1898). Dams which failed to provide a slide or chute were declared a nuisance and could be abated by action through the local justice of the peace (s. 160.3, R.S., 1898). The preparers of the Revised Statutes of 1878 made small changes and placed these provisions in the Rivers and Floats chapter of the statutes. Chapter 239, Laws of 1881, also made minor revisions.

Chapter 328, Laws of 1895 (s. 1607(a), R.S. of 1898), declared all lakes which were "meandered and navigable in fact" to be navigable and public waters. Although this would seem to imply non-meandered lakes were nonnavigable, the court in Bixby v. Parish, 148 Wis. 421 (1912), ruled that the same test of navigability applied to lakes and streams (whether it was navigable in fact). The legislature adopted this construction in 1917 (Chapter 335) to form what is essentially s. 30.10(1) today.

The common law, as it developed in Wisconsin, treated lakes and streams somewhat differently with respect to lawful riparian rights. The riparian owner on a lake, although he did not own the bed of the lake, could legally construct docks, solid piers and shore protective works (including breakwaters) if they did not significantly obstruct navigation. On the other hand, nonriparian owners who placed structures and riparian owners who placed fill or other obstructions not in aid of navigation and not to protect their land were often prosecuted for

creating a "purpresture," an invasion both of the state's title (under the trust doctrine) and the rights of the public, or a nuisance. Note that no law prohibited structures in lakes up to this time.

On streams a somewhat different approach was taken. In Jones v. Pettibone, 2 Wis. 308 (1853), the Supreme Court said: "If the stream is navigable in fact, the public have the right to use it for the purpose of navigation, and the right of the owner is subject to the public easement. But, with this exception, the right of the owner to use the land as he pleases is perfect." Laws had been developed to penalize obstructions but unlawful obstructions were interpreted by the courts to mean only those that created a material obstruction to navigation. The "navigation" protected was generally confined to the main channel. Riparian owners could lawfully fill their "land" or construct buildings and other structures as long as they did not materially obstruct navigation, State v. Carpenter, 68 Wis. 165 (1887) and Janesville v. Carpenter, 77 Wis. 288 (1890). The latter case involved Chapter 423, Laws of 1887, which prohibited driving piles and building piers, cribs or other structures in the Rock River within Rock County. This law was ruled unconstitutional and Carpenter was allowed to build his building in the Rock River under common law riparian rights.

Chapter 652, Laws of 1911, the first of the Water Power Laws, changed state policy in respect to the obstruction of navigable streams. Section 1596(2) (non part of s. 31.25, Wis. Stats.) was created and provided that "Any dam, bridge or other obstruction constructed or maintained in or over any navigable waters of this state in violation of the provisions of this section is hereby declared to be a public nuisance, and the construction of any such dam, bridge or other obstruction may be enjoined or its maintenance abated by action at the suit of the state or any citizen thereof" (emphasis added). Section 1596(3) (now part of ss. 31.23 and 30.03) was created and provided for a \$50 forfeiture to be collected by action of the attorney general for each day a violation of subs. (2) exists. Section 1596(4) (now part of s. 30.03) was also created and required the Railroad Commission to report violations of Section 1596 to the governor who could have the attorney general initiate an action as provided in subs. (2) and (3). Former s. 1596 became s. 1596(1).

The above provisions would appear to have the effect of preventing the construction or maintenance of any obstruction not authorized by the legislature, including what were considered to be lawful activities, under common law. However, the Railroad Commission (RRC) did not consider the new law clear enough. On March 25, 1914 (the first apparent case under the new law) the RRC rendered its findings on a complaint regarding G. C. Sutherland's building in the Rock River in Janesville (no conclusions of law were determined but the case was apparently forwarded to the governor for any action he deemed appropriate). In its opinion, the RRC said, "It will be observed that the statute speaks of unlawful obstruction. Consequently, in the absence of any judicial interpretation limiting and defining the term 'unlawful obstruction' the administration of the statute is rendered difficult and uncertain. As a guide to the commission, it is essential that some general criteria be established by which the unlawfulness of any structure in or over a navigable stream may be determined. It is exceedingly important that a judicial determination of the rights of property owners involved in this proceeding be had without unnecessary delay. Under the circumstances we do not deem it incumbent upon us to pass upon the legality of the maintenance of the obstructions here in question."

The Supreme Court received this case, State v. Sutherland, 166 Wis. 511 upon appeal from a circuit court judgment and rendered its decision on January 5, 1918. (During the interim period one obstruction case was referred to the governor by the RRC.) The court in its decision said, "In reliance upon previous decisions large investment has been made, property rights have grown up, and, as before stated, these rights so far as vested should be protected. It must, therefore, be held that the provisions of sec. 196, as amended, do not affect the rights of the defendant accrued at the time of enactment of ch. 652, Laws of 1911. Structures of the character of those complained of in this case, similarly situated and erected prior to the enactment of ch 652, having been declared to be lawful and not nuisances, cannot be made such by mere legislative fiat. It must be held therefore, that the building described in the complaint cannot be removed as a nuisance within the rules above stated."

In a decision dated November 5, 1924, the RRC said "at [English] common law, the bed of a navigable stream being owned by the sovereign, such structures as those erected in the Rock River were purpresture and had no

legal sanction. Under the doctrine of Jones v. Pettibone, however, the court found itself forced to the conclusion that since the owner of the bed might do with its own as he pleased, so long as he did not interfere with the rights of another, such as structure was not unlawful unless it materially interfered with the public rights of navigation." The RRC also described the "Sutherland" case as one which arose after the adoption of the new state policy against encroachment upon the navigable waters of the state. Valid legislation had been passed which makes any dam or obstruction in such waters, not authorized by the state, a public nuisance, subject to abatement at the suit of the state or any citizen. The court held that the investment in buildings over the Rock River in Janesville, which had been made in reliance upon the holding in the "Janesville Cases" should be protected by the courts under the rule of stare decisis (a doctrine of following principles laid down in previous judicial decisions).

Briefly then, the change in state policy was that on streams a riparian owner could no longer use his property in any manner he chose even if he did not materially obstruct navigation.

The guidance or criteria sought by the RRC for determining what "unlawful obstructions" were, however, apparently never developed. Instead, it appears that the RRC, and later the Public Service Commission (PSC), adopted a policy that unlawful structures were those which actually interfered with navigation and the incidents thereto. The Supreme Court in Bond v. Wojahn, 269 Wis. 235 (1955), concurred in that interpretation of the statutes. Structures determined to be lawful under the common law continued to be lawful as long as they did not materially affect navigation. Further development of the statutes (Chapters 30 and 31) eventually addressed what was lawful and made provisions for authorizing those activities.

Chapter 380, Laws of 1915, modified s. 1596(3) of the statutes (now part of s. 31.23) to provide for a forfeiture of not more than \$50 for each day a violation exists. It also created s. 1596-22(1) (now part of s. 31.23) which provided that anyone violating any provision of the Water Power Act or any order made pursuant to the act shall forfeit not more than \$1000 and s. 1596-22(2) (now part of 30.03) which provided that forfeitures shall be payable to the state treasury and the attorney general or appropriate district attorney shall initiate the civil suit.

Chapter 474, Laws of 1917, revised and placed the Water Power Act and the Mill Dam Act in Chapter 31 of the statutes. Most of the wording and provisions remain nearly unchanged today. Subsection 1596(3) and section 1598 were consolidated and revised to form s. 31.23(1), Wis. Stats., and subs. 1596-22(1) was revised to form s. 31.23(2). Subsection 1596(2) and section 1603 were consolidated and revised to form s. 31.2. Subsection 1596(4) and subs. 1596-22(2) were consolidated and revised to form s. 31.24 (now part of s. 30.03).

Chapter 335, Laws of 1917, revised and renumbered Chapter 70, "Rivers and Floats," to form Chapter 30, "Navigable Waters and Navigation." Section 1607a became subs. 30.01(1) and subsection 1596(1) became subs. 30.01(2).

Chapter 313, Laws of 1931, created an additional exception to the forfeiture provisions of s. 31.23(1) (1917) to allow the cutting of weeds.

The RRC (and the PSC after 1931) apparently held only about a dozen hearings on obstructions through 1933. After Chapter 455, Laws of 1933, which said "it shall be unlawful to deposit any material or to place any structures upon the bed of any navigable waters..." was adopted, the PSC became involved in many enforcement actions, particularly involving boathouses and fills. There is no way of knowing if or how many enforcement actions were undertaken by local district attorneys. Prior to 1933 the statutes simply provided for abatement or a forfeiture for obstructing navigable waters. There was no actual prohibition except for what is now s. 30.10(2) which pertained to streams. The 1933 amendment clearly made all fills or structures unlawful in lakes as well as streams. Despite this fact, the PSC continued the previously mentioned policy of allowing structures which were lawful under common law.

Chapter 331, Laws of 1941, made the first provision to allow obstructions other than dams. It required permits for bridges over navigable waters wider than 35 feet.

Chapter 335, Laws of 1949, for the first time provided a mechanism to authorize other structures in navigable waters. After its adoption many additional enforcement actions were undertaken since it was a change of the common law and many people continued to place previously "lawful" structures without a permit.

Chapter 441, Laws of 1959, reorganized and modified Chapter 30 of the statutes to the form we have today and also revised Chapter 31. Subsection 30.01(1) and (2) became subs. 30.10(1) and (2). Most of the provisions of former s. 31.23(1) were placed in s. 30.15. Subsection 31.23(1) retained similar language pertaining to bridges and dams and daily forfeitures. Former s. 31.24 was repealed and its provisions were placed in s. 30.03.

Chapter 148, Laws of 1961, added what is currently 30.03 (4) to the statutes. It provided for the department to issue orders regarding violations and for the attorney general to initiate proceedings to enforce the orders.

Chapter 151, Laws of 1961, modified s. 30.15, Wis. Stats., by adding what is currently paragraph (d) which refers to violations of s. 30.12 or 30.13. "And every violation of s. 30.12 or 30.13" was also added to s. 30.15(4).

Chapter 200, Laws of 1965, provided for conservation wardens to issue citations and present cases in court for violation of ss. 30.12, 30.18 or 30.195. Prior to this enactment all violations had to be referred to the Attorney General for prosecution. At that time well over 100 cases were awaiting final disposition at the Attorney General's office.

Chapter 614, Laws of 1965, provided for the eventual creation of the Department of Natural Resources through merger of the conservation commission and Department of Resource Development (which was created by this law). This merger was consummated under chapter 276, Laws of 1969, and various statutes were modified to refer to this new Department.

Chapter 365, Laws of 1975, made very significant changes in the navigable waters enforcement program. A uniform citation form and procedure was created to apply to all actions to recover forfeitures for violations of s. 134.60 and Chapters 23, 26, 27, 28, 29, 30, 31 and 350, and any administrative rules promulgated thereunder. The procedure is laid out in ss. 23.50 to 23.85 of statutes. This change was significant because the Department, through the action of wardens, was able to initiate civil enforcement action directly in the circuit court without having to go through the cumbersome and time-consuming procedure of working through the Attorney General's (A.G.) office. This option of going through the A.G.'s office is still open when little likelihood exists of achieving appropriate enforcement through local courts.

## **STANDARDS**

### ***Statutory***

Sections 23.50 to 23.85, Wis. Statutes. These sections apply to all actions in circuit court to recover forfeitures, penalty assessments, applicable natural resource assessments and applicable natural resource restitution payments for violations of Chapters 23, 26, 27, 28, 29, 30, 31 and 350 or any administrative rules promulgated thereunder. The standards found in Chapter 23 are clear but lengthy and will not be enumerated in this handbook.

Section 30.03, Wis. Stats. The Department has the obligation under s. 30.03 to report to the Governor every forfeiture incurred under and every nuisance committed in violation of Chapters 30 and 31. The Attorney General, if requested, or any person authorized by the Governor shall institute proceedings to recover any forfeiture incurred or abate any nuisance committed under Chapters 30 or 31. All forfeitures shall be paid directly into the state treasury.

When a possible violation of the statutes relating to navigable water or an infringement of public rights comes to the attention of the Department, it may, upon at least 10 days notice, conduct a hearing pursuant to ch. 227 and

issue orders to the apparent violator to stop their activity or restore an area to protect the public interest. If the person fails to obey the order, the Department may request the attorney general to institute proceedings to enforce its order. Although no penalty may be assessed for violation of such an order, violation of a judgment enforcing the order may be punished by civil contempt proceedings. See process section for additional comments on s. 30.05.

Section 29.29(3), Wis. Stats. Under this section it is illegal to throw or deposit into any waters within the jurisdiction of the state any lime, oil, tar, garbage, refuse, debris, tanbark, ship ballast, stone, sand, decayed wood, sawdust, sawmill refuse, mill shavings, waste material of any kind, acids, chemicals or any other substance deleterious to game or fish life. This section is most commonly used to prosecute littering violations. Sand blankets approved under 30.12(3)(a)(1) are exempt.

Section 30.15(4), Wis. Stats. Under this subsection every obstruction constructed or maintained in or over any navigable water is declared to be a public nuisance and may be enjoined and the maintenance may be abated by the state or by any citizen. "Where a bridge obstructing navigation was necessary, reasonable, and existing before plaintiff moved into area, defendant city need not abate the nuisance." Capt. Soma Boat Line v. Wisconsin Dells, 79 W(2d)10.

Section 31.23(1), Wis. Stats. Under this subsection every person who constructs or maintains in navigable waters any bridge or dam not authorized by law shall forfeit for each such offense and for each day that the navigation of such waters are obstructed by such bridge or dam a sum not exceeding \$50.

Section 31.23(2), Wis. Stats. Under this section any dam, bridge, or other obstruction constructed or maintained in or over any navigable water of this state in violation of chapter 31 and every dam not furnished with equipment required by the Department is declared to be a public nuisance and may be enjoined or abated by the state or by any citizen.

### ***Administrative***

NR 301, Wisconsin Administrative Code. This code requires that the Department shall not act on after-the-fact permit applications or approvals if enforcement actions are pending and the project is likely to cause environmental damage, or the Department has an objection to the issuance of the permit and/or the prosecuting attorney in the action has not given consent to the processing of the application.

Note: See the specific enforcement provisions in each handbook chapter and administrative rule which will not be covered here.

## **PROCESS**

The field investigation is the responsibility of the investigating warden. The warden is required to file form #4100-48 (the incident report which is used for tracking purposes) and to make the initial determination if a violation of Chapter 30 or 31 has occurred. Since the warden may not be an expert at ordinary high water mark determinations, navigability, or water law he may call on the Water Management Investigator to help assist in the collection of data and to determine if a violation exists.

After determining jurisdiction and that a violation exists, the warden is to collect evidence which may include any or all of the following items:

- 1) a legal description of the land on which the violation occurred,
- 2) name and address of the landowner,

- 3) the agent or contractor acting on his behalf,
- 4) equipment used on the site,
- 5) documentation of the need for and lack of authority for a permit and any correspondence from contact with Department employees and/or other agencies,
- 6) the description of material added, exposed or affected by the project, including the source, volume and approximate dimensions,
- 7) the characteristics of the water body being affected,
- 8) the characteristics of the shoreland,
- 9) pictures of the site,
- 10) engineering surveys,
- 11) ordinary high water mark, and
- 12) navigability.

Not all of the above may be necessary in any single investigation, but all of these points should be considered.

All Department employees should follow manual code 4147.1 procedures for reporting water law violations. The process involves the transfer of information from a Department employee to the field warden, who then makes an investigation and determines if a violation exists.

The warden can order an immediate halt to any further work being done under section 29.05, Wis. Stats., and/or he can issue a citation on the spot. At the discretion of the warden, the violator may be given a time limit to restore the site and the case could be dismissed if compliance follows. He also has the option of taking the case to the District Attorney and determining what action should be taken. If the District Attorney fails or declines to prosecute, the warden may then process the violation through channels for a proceeding under s. 30.03, Wis. Stats.

When there is little likelihood that the local judge will give a favorable decision or where the District Attorney refuses to take action, the case file should be submitted through the Water Regulation Section for an administrative hearing by the Division of Natural Resources Hearings pursuant to s. 30.03(4). Restoration and/or abatement can be ordered through a s. 30.03 hearing. (The examiner cannot collect forfeitures. Forfeitures can only be collected through referral of the case to the Attorney General's Office.)

The procedure under s. 30.03, Wis. Stats., has proven to be a long, cumbersome route. Local enforcement pursuant to the individual statutes is generally a better alternative for faster action. The Department in the past had used s. 30.03(2) to collect forfeitures. This procedure was dropped because of questionable legality and the fact that the Department was being accused of being both the judge and jury in the early 1970s.

Sections 30.12, 30.18, 30.125, 30.195 and 947.047, Wis. Stats., are criminal statutes. Most violations are structures and/or deposits in navigable waters and it is customary for the warden to issue a citation under the civil proceedings of s. 30.15 to avoid the need for criminal prosecution. The evidence required for a civil conviction is much less than for a criminal conviction. When issuing a citation, the warden should request restoration under s. 23.79(3) unless the activity is to be authorized by an after-the-fact permit.

There are many books written about evidence collection which may be consulted as required. For additional information, see Law Enforcement Handbook "Water Management Cases Investigation"--pages 38-1 and 38-2 and "Evidence"--pages 34-1 to 34-9.

See attachment at the end of this chapter on Witness Guidelines and the general outline of questions for a water regulatory hearing.

## **FINAL DISPOSITION**

The warden should follow the court directions or the examiner's decision to determine if the order has been adhered to and all required measures have been complied with. Monitoring of this activity is also part of the final disposition. When the court or examiner's order has been complied with, the warden should, by Manual Code, report to his supervisor that the case has been adequately completed and can be considered closed. If the order has not been complied with, the next step would be another contact with the District Attorney or Attorney General's office to initiate a contempt of court proceeding.

Once the case has been taken to local court the warden is required to file form #4100-48 with the Area warden. The monitoring and follow-up procedure is established by Manual Code 4112. 1.

## CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: February 10, 1983

FILE REF: 3500

TO: District Directors  
Water Management Coordinators  
Water Management Specialists

FROM: Richard J. Knitter - WRZ/5

SUBJECT: Procedures for the Disposition of Old Water Regulation Violation Cases Pending on District Enforcement Lists

There is a rather lengthy backlog of pending Water Regulation violation cases in each District. These cases keep reappearing on the enforcement lists year after year with no apparent actions initiated to dispose of them.

The Water Regulation staff have developed these guidelines and suggestions for your use in determining the appropriate course of action to dispose of each case.

Since most of these cases are very old, the option of local enforcement action is not likely to be available to us. This leaves us with 3 options:

- A. Dismissal
- B. Authorization
- C. Abatement

You will note that forfeiture proceedings pursuant to s. 30.03, Stats., have not been included. It is our feeling that is not worth the effort required to secure a forfeiture given the importance of staying on top of our current workload.

We suggest that the following procedure:

1. The Water Managers should review the file to familiarize themselves with the background of the case. From the file, the following determinations should be made:
  - a. the type and location of the violations;
  - b. the alleged violator;
  - c. the current owner;
  - d. whether the project is a violation of a permit or order that was issued;
  - e. whether any correspondence with the violator may indicate that he/she was informed that a violation existed, and
  - f. if there is any other pertinent information that could have a bearing on which way the case should now be resolved.

(If the District staff have no file, request a copy from the Central Office.)

2. The water Manager and/or Local Warden should field investigate the site of the violation if necessary
3. Answer the following questions:

- a. Does the violation still exist?
- b. Is the present owner responsible for the creation and/or maintenance of the existing violation?
- c. Is the violation detrimental to the Public Interest?
- d. Is the violation environmentally degrading (elimination or reduction of fish and game habitat, pollution, etc.)?
- e. Is the violation an obstruction to navigation?
- f. If the violation is on a stream, does it reduce the effective flood flow capacity of that stream?
- g. Would it be more detrimental to the environment to correct the violation than to leave it in its present state?

The following recommendations are intended to cover most situations involving violations. If any of the old enforcement cases have situations not covered by these recommendations, contact me for assistance.

- If the answer to question a is no, dismiss the case.
- If the answer to question a is yes, and the answer to question b is no, then dismiss the case (or in extreme cases where we want abatement, we [the Department] can abate it on your own).
- If the answer to b is yes, the case can either be dismissed, authorized or abated.

We recommend dismissal of the case if:

- the answers to questions c, d, e, and f, are no.
- the answers to questions c, d, and g, are yes and e and f are no.

We recommend authorization of the violation if:

- the answer to questions c and d are no and e and/or f are yes, but statutory requirements can be met and the owner is willing to apply for authorization.

We recommend abatement of the violation if:

- the answers to questions c and d are yes.
- the answers to questions c and d are yes and g is no.
- the violator will not apply for authority.

No case will be taken off the violation lists without an adequate memorandum justifying that the case should be closed. Include in the close-out memo the following information depending on which method is chosen to resolve the case.

1. If the decision is made to dismiss a case include the following in the memo:
  - a. number of the case on the violation list
  - b. date of final field inspection
  - c. reason(s) for dismissal
  - d. pictures of the site (for reference in case there are any future violations at the site).
2. If the decision is made to grant authority for the violation, by either issuing an after-the-fact permit or an approval letter, include the following in the memo:
  - a. number of the case on the violation list;
  - b. date of field inspection;
  - c. reasons for authorizing violation (i.e., it would be more damaging to the environment to correct it); and

- d. a copy of authorization
- 3. If the decision is made to seek abatement of a violation, include the following in the memo.
  - a. Review the evidence of hand, and determine if it is sufficient to establish the facts. If not, determine what is needed and secure it. If you find that no sufficient evidence is available, we may have to dismiss (even though it is not the preferred action).
  - b. Determine the type of abatement that would be appropriate (i.e., removal of fill, returning stream to its original channel, etc.)
  - c. Try to get voluntary abatement first. Contact the owner/violator and try to get an agreement to restore area. If the violator is agreeable, set a reasonable deadline for compliance.
  - d. If the violator will not restore the area, inform him/her that the case will be referred for an Administrative, s. 30.03 hearing to seek abatement of the violation.
  - e. Request 30.03 Hearing.

In order to dispose of these cases in a timely manner, it is recommended that each District develop and follow a close-out system. A procedure similar to the following might be considered useful:

- 1) The District WMC and the Area WMS should review the enforcement case list county-by-county to determine who should be responsible for pursuing each case.
- 2) A deadline date for the final resolution of each case should be set and adhered to.
- 3) The person responsible for each case should set up a specific date with the county warden (if necessary to field inspect the violations in that county).
- 4) Investigation reports and close-out memos should be put in the appropriate case file with copies sent to the Central Office.

The need for a complete close out memorandum is extremely important. A review of the files in the future might resurrect a case where the close-out was not adequately documented. This may result in unnecessary and time-consuming backtracking to assure that the case was brought to a satisfactory conclusion.

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## **WITNESS GUIDELINES**

Almost everyone who is called upon to testify before a hearing examiner, a local board, or in court will be somewhat nervous and apprehensive, especially if they are taking the witness stand for the first time and don't know what to expect, but if a prospective witness is thoroughly familiar with the subject matter of the testimony and has read the following guidelines, he or she should be less apprehensive than a witness who takes the stand without any preparation, and should do a better job of testifying as well.

### ***Preparation for the Hearing or Trial***

You should familiarize yourself as much as possible with the facts about which you will be testifying. Consult your records to refresh your memory about past events. If your testimony involves an object or a place, refresh your recollection by re-inspecting the object or revisiting the site, if possible.

Your attorney will probably go over a list of questions that you are likely to be asked. You should, of course, think about the questions and be prepared to answer them, but don't try to memorize what you are going to say,

Dress appropriately when you are to testify; not too casually. Men should wear suits, sport jackets with ties, or uniforms. Women should wear suits or dresses appropriate for daytime wear, or uniforms.

### ***General Guidelines***

You will be required to take an oath to tell the truth and nothing but the truth--one way is a halting, stumbling, hesitant manner, which makes the hearing examiner, board member, judge or jury doubt that you are telling all the facts in a truthful way; and the other way is a confident, straightforward manner, which inspires faith in what is being said. Make an effort to relax and testify in the latter matter.

When an attorney is asking you a question, you will usually look at that person, but when you answer (except when you simply answer that you didn't hear or understand the question), you should direct your testimony to the hearing examiner, board, judge or jury and look at him or them while you are talking. Speak clearly and loudly enough so that everyone can hear you. Don't chew gum while testifying. Don't talk with your chin in your hand or with your hand over your mouth. It's best not to lean your elbow on the railing of the witness box or on the arm of the chair anyway--it makes you look careless and either unconcerned or uncertain about your testimony. Sit comfortably in the witness chair, but don't slouch.

A good witness listens carefully to a question and then answers calmly and directly in a sincere manner. Beware of double questions (two questions in one) and of questions with unestablished factual assumptions built in. Answer the question that is asked, not the question that you think the questioner intended to ask. If you find a question confusing, either ask the attorney to repeat it or rephrase it yourself, saying "Are you asking if...

Give positive, definite answer when possible. Avoid saying "I think," "I believe," "In my opinion." If you don't know, say so, but if you do know, don't qualify your answer.

Testify only to what you know of your own knowledge and experience. Don't speculate about things that might have happened. If you have some recollection of an event but have forgotten some details, testify to whatever you can remember, and indicate that you cannot remember any more. If you would be able to remember better if you referred to your records, state that you would be able to testify in more detail if you consulted your records. You may then be asked to do so.

Be serious at all times, both in the hearing or court room and in nearby halls. Avoid laughing, loud conversation,

and any kind of disturbance. Don't read newspapers or magazines while the hearing or trial is going on. Above all, don't laugh at or comment out loud on any other witness' testimony while they are testifying.

### ***Direct Examination***

During your direct examination, you may elaborate and respond more fully to the questions that are asked than is advisable on cross-examination. However, when you volunteer information, don't ramble or stray from the main point raised in your attorney's question. If your testimony is detailed and technical, the hearing examiner, board members, judge or jury will probably find it easier to understand if it is presented in the form of short answer to a logical progression of questions. Your attorney will advise you, before you testify, as to whether you will be expected to answer a general question with a long narrative or answer several specific questions with short answers.

### ***Cross Examination***

On cross examination, don't volunteer more information than is asked for in the question. Once you have answered the question, don't keep talking just because the attorney seems to be waiting for you to say more. Don't argue with the opposing attorney, and don't make wisecracks in response to his or her questions. Try to appear cooperative. Give straightforward answers that don't sound evasive. Don't refuse to answer a question (although you may, of course, ask that a question be repeated or restated if you don't hear or understand it). If a question is improper, and you shouldn't answer it, your attorney will object for you.

Don't lose your temper. Witnesses are more likely to get backed into an untruth or inconsistent statement when they are angry and not thinking rationally.

Whatever you do, tell the truth. Don't try to twist your testimony according to what you think the opposing attorney is driving at. Don't stop to try to figure out whether your answer will help or hurt your side. If the opposing attorney asks you an unexpected question, just answer as truthfully as possible.

If a "yes" or "no" answer to a question is demanded, but you think that the question cannot be answered truthfully or accurately with a "yes" or "no," say so. You usually will be allowed to qualify your answer. If you are required to answer "yes" or "no," your attorney will have the opportunity to ask you to explain or qualify your answer on redirect examination.

If you realize that an answer was wrong, correct it immediately. If you remember something that makes a previous answer wrong several minutes or questions later, you should ask the hearing examiner, board chairman or judge if you can correct your answer to the question, indicating that you just remembered something. An accidental omission or inaccuracy is quite human and will probably be overlooked if you admit your mistake readily, but if you are later caught in what looks like a deliberate lie, the credibility of all your testimony will be in doubt.

### ***Additional Guidelines***

- I. Any materials prepared by you for water regulation case may be used as exhibits and presented as evidence at the hearing or trial. Be prepared to explain how they were prepared (from maps, photos, etc.), who prepared them, and bring, if possible, all originals used in their preparation.

(Example - Maps are often prepared by tracing aerial photos, topographic maps, etc. If you can bring the original topographic map or aerial photo, please do.)

You may use field notes and other materials to refresh your memory when you testify. Remember, however, that anything you use to testify from may be reviewed by opposing counsel.

- II. If you took photos, these may be used as exhibits and presented as evidence. Be prepared to explain what equipment was used, your experience with that equipment, and where each photo was taken. Be prepared to discuss what appears in the photo, whether it is a fair representation of the object or scene pictured, and why it is, in your opinion, important.

On the back of every photo you take, put your name, date, what it depicts (generally), the direction in which the camera was pointing and the distance from the object photographed.

- III. Each of you will probably be testifying as an "expert witness" in your respective fields. This is why your field experience and educational background is extremely important.

As an expert witness, you may:

- (a) testify in the form of an opinion based on your observations and experience;
- (b) qualify your answers to questions. You may be asked to answer a difficult question with a "yes" or "no" answer on cross-examination. You probably will not have to answer such a question categorically. You should be able to qualify your answer. do not be afraid to take your time and qualify your answer.
- (c) If you do not know the answer to a question because of lack of experience or evidence, do not be afraid to answer "I don't know" or "that's outside my area of expertise." It is more damaging to attempt to answer something of which you have no knowledge than to admit that you have not had occasion to research that specific issue.

- IV. The enforcement actions that you will be involved with are generally Chapter 30 cases. When preparing your evidence or field reports, review the specific statute or administrative code involved.

For example, assume that you are dealing with an application submitted pursuant to section 30.19, Stats. The standards for granting a permit under this section are whether:

- (a) the project will injure public rights or interest, including fish and game habitat;
- (b) the project will cause environmental pollution as defined in section 144.30(9)-,
- (c) there will be an occurrence of any material injury to the rights of any riparian owners on any body of water.

In reviewing your reports and preparing your testimony, keep these standards in mind. You may be relying primarily on the "injury to public rights or interest" standard, i.e., loss of fish and game habitat, damage to remaining habitat, aesthetic damage and possible destruction of wetlands. Try to couch your testimony in terms of the statutory standards.

# **GENERAL OUTLINE OF QUESTIONS FOR WATER REGULATORY HEARINGS**

Michael J. Cain and Linda L. Wymore  
Training Session - Sept., 1980

When you appear as a witness at Department hearings or trials relating to water regulatory matters, the format for examination by the attorney will generally conform to this outline. In all cases, however, you should discuss your testimony with the attorney who will be examining you prior to the hearing or trial.

- (1) Name
- (2) Residence
- (3) Educational background - including emphasis, post-graduate work, etc.
- (4) Work experience since completion of education?
- (5) Position with the Department?
- (6) Duties and functions with the Department? Include Chapter 30?
- (7) Field investigations and surveys? How often?
- (8) Have you had occasion to...
  - ... determine OHWM...
  - ... conduct a fisheries survey...
  - ... conduct a wildlife survey...
  - ... etc...
- (9) How often?
- (10) How? (Generally - Procedures)
- (11) Are you familiar with the site involved in this hearing?
- (12) Have you visited the site.?
- (13) How many times?
- (14) When did you first visit the site?
- (15) What was the purpose of that visit?
- (16) Who accompanied you?
- (17) What, generally, did you observe...  
  
(in relationship to fisheries, wildlife, etc.?)

- (18) If applicable - 2nd visit? When? Purpose? Who accompanied?
- (19) What did you observe?
- (20) Are you familiar, generally, with the applicant's proposal? Or the violation in question?
- (21) In your opinion, to a reasonable scientific certainty, what effect might (or does) this construction (or violation) have on (your specific area, i.e., fisheries, wildlife, etc.)

When presenting exhibits, which may include maps, letters, memos, photos, etc., the questioning will usually be:

- (22) I have placed before you what has been marked Exhibit No. \_\_\_\_\_ for purposes of identification.
- (23) For purposes of identification, can you tell us what this is and describe it generally?
- (24) Was this prepared by you or under your direction?
- (25) I now offer this Exhibit as Department's Exhibit No. \_\_\_\_\_. (Specific questions about the Exhibit will then usually follow.)

When presenting photographs, the questioning will generally be:

- (26) Are you familiar with the site of this application (or violation)?
- (27) Did you visit the site and take photographs of the site? When? With whom?
- (28) I show you what have been marked as Exhibits No. \_\_\_\_\_ through \_\_\_\_\_. Can you identify these and describe generally what they depict.
- (29) Were these photographs taken by you?
- (30) Does each of these pictures fairly and accurately represent the conditions at the site?
- (31) I show you what has been marked Exhibit \_\_\_\_\_. What does this photo show? (You will probably go through each photo individually to describe it for the examiner or judge.

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**CORRESPONDENCE/ MEMORANDUM****STATE OF WISCONSIN**

DATE: July 14, 2000

TO: Water Management Specialists  
Water Management Engineers  
Aquatic Habitat Experts

FROM: Mary Ellen Vollbrecht, FH/3

SUBJECT: Site Inspections & Trespass Law

INSERT: Chapter 50 Water Regulation Handbook

In response to a number of recent questions and in light of the number of staff now conducting waterway site inspections, here is:

- A copy of s.31.02(3), Wisconsin Statutes, establishing the statutory authority to enter property to investigate a waterway;
- The Department's guidance on conducting inspections following the 1996 changes to the trespass law.

Your persuasive skills will nearly always result in explicit or implicit consent to enter private property. Carry a copy of 31.02 with you.

**31.02 POWERS OF THE DEPARTMENT**

(3) The department or any member or any agent or employee thereof shall at all times be accorded free access to any and all parts of any dam and appurtenances constructed or maintained in navigable waters and may enter upon any property to investigate a waterway or use of water from any lake or stream.

**CORRESPONDENCE/ MEMORANDUM****STATE OF WISCONSIN**

DATE: October 29, 1997

FILE REF: 8300

TO: Division Administrators  
Bureau Directors  
Regional Directors  
Regional Media Leaders

FROM: Jim Kurtz - LS/5

SUBJECT: Guidance on Conducting Inspections Following Trespass Law Changes

My staff has recently been apprised of concerns raised by program staff in central office and in the regions concerning their ability to conduct inspections on private property without being issued a citation for trespass. The concerns apparently stem from recent publicity about changes to the trespass law which became effective on July 11, 1996 and press accounts about a county zoning administrator who was cited for trespass after inspecting private property for compliance with the county's zoning ordinance for junkyards.

Attached is a memorandum providing additional background about those concerns, the changes to the trespass law and the relationship between those changes and the specific statutory authority for Department staff to conduct inspections in various program areas. Based on the attached analysis, please advise your staff who conduct inspections pursuant to statutory authority to use the following guidelines in conducting those inspections.

Department staff who conduct inspections on private property pursuant to specific statutory authority should carry a copy of the statutory provisions with them in the event their authority to conduct inspections on private property is challenged by the owner or occupant of the property inspected.

In most instances, Department inspections can and should be conducted after notifying the property owner or occupant (and explicitly or implicitly securing his or her consent to the inspection).

If the inspection has not been scheduled in advance with the consent of the property owner or occupant, Department staff should attempt to identify the owner or occupant of the property to be inspected in advance of, or upon arrival at, the property and obtain the consent of property owner or occupant to conduct an inspection. (Showing the property owner or occupant a copy of the statutory authority for the Department to conduct the inspection will usually result in consent being given to enter and inspect the property.)

If consent to enter the property is refused, Department staff should seek a special inspection warrant under ss. 66.1 22 and 66.1 23, Wis. Stats., to inspect the property. Procedures for obtaining a special inspection warrant are outlined in Manual Code 4191.5.

If, during the course of conducting an inspection, the property owner or occupant notifies the Department staff that he or she is withdrawing consent to remain on the property, Department staff should leave the premises as requested. If further inspection of the property is required, Department staff should seek a special inspection warrant under ss. 66.122 and 66.1 23, Wis. Stats., for conducting the remainder of the inspection

In the event that the property owner or occupant cannot be located or cannot be contacted to provide consent, Department staff should consult with their supervisors and program attorney to determine

whether and under what conditions an inspection may be conducted.

Following these guidelines should minimize any potential conflicts associated with the Department staff conducting authorized inspections, in light of the "new" trespass law. If there are additional questions about this guidance, please have your staff contact their respective Bureau of Legal Services program attorney for assistance.

Attachment

## CORRESPONDENCE/ MEMORANDUM

## STATE OF WISCONSIN

DATE: October 29, 1997

FILE REF: 8300

TO: Jim Kurtz - LS/5

FROM: Tom Steidl LS/5

SUBJECT: Proposed Guidance on Inspections

Recently, Department staff have raised concerns about their authority to conduct inspections of private property in light of changes to the trespass law (s. 943.13, Wis. Stats.) and the publicity associated with a case in which a county zoning administrator was cited for violating the "new" trespass law. The purpose of this memo is to provide general guidance to Department staff who conduct inspections as part of their program responsibilities, in light of the changes to the trespass law. [NOTE: This guidance does not apply to or address the authority of conservation wardens to enter private property in carrying out their law enforcement responsibilities, but it is intended to apply to other (noncredentialed) DNR staff.]

### Changes to the Trespass Law

The changes to the trespass law which have been the focus of Department staff's concerns became effective on July 11, 1996 with the enactment of 1995 Wisconsin Act 45 1. The pertinent provisions of the trespass law, as affected by the 1995 act, [relevant excerpts of the trespass law, as amended, are attached] include:

- A trespass violation occurs **whenever anyone enters certain, specific types of land** (enclosed, cultivated or undeveloped land or land occupied by a structure used for agricultural purposes) **without the expressed or implied consent of the owner or occupant**; it is also a violation if the owner or occupant of such lands gave consent to enter or remain on the lands for a specified purpose or subject to specified conditions and the person who received that consent enters or remains on the land for another purpose of contrary to the specified conditions.
- A trespass violation also occurs **whenever anyone enters or remains on another's land after having been notified by the owner or occupant not to enter or remain on the premises**; notification can occur if the person is notified personally, either orally or in writing or if the land is posted.

There are **only 2 specific statutory exceptions contained within the trespass law** which relate to DNR programs:

- a person entering the land of another, other than a residence or buildings or the curtilage of the residence or buildings, for the purpose of removing a wild animal as authorized under s. 29.59 (2), (3) or (4), Wis. Stats.; and
- a hunter entering land that is required to be open for hunting under s. 29.59 (4m) [wild animal removal] or 29.598(7m) [wildlife damage programs], Wis. Stats.

### Citation Issued to County Zoning Administrator

Publicity about the changes to the trespass statute occurred when a county zoning administrator received a citation for trespass after going on private land to inspect the property to determine whether the county's junkyard ordinance was being violated. (The citation was subsequently dismissed.) Publicity about the applicability of the trespass law to public employees conducting inspections as part of their job responsibilities has focused attention of DNR staff on the possibility of receiving a citation for violating the trespass law.

### Department's Statutory Authority for Inspections/Entry on Private Property

The Department staff have been specifically authorized by statute to conduct inspections and to enter private properties for purposes of conducting inspections for specific programs which the Department administers or oversees. A partial listing of those specific program-related statutory authorities include:

- s. 29.05 - fish and game (dead or diseased wild animals)
- ss. 31.02(3) and 31.19 - dams and navigable waters
- s. 280.13(1)(c) - water supply
- s. 281.96 - prevention and abatement of water pollution at industrial establishments
- s. 281.97 sewerage and water systems and sewage or refuse disposal systems
- s. 283.55(2) - water pollution discharge permit holders
- s. 285.19 - air contaminant sources
- ss. 287.93 and 289.91 - solid waste
- s. 291.91 (1) and (2) - hazardous waste
- s. 292.11(8) - hazardous substance spill
- s. 293.86 - metallic mining
- s. 295.17(2) - nonmetallic mining

While the scope of the authority granted the Department under these specific statutory provisions varies (based on the specific language of each provision), generally the statutory provisions authorize a department employee to "enter any property" where a regulated entity is located to "inspect" or "investigate" "for the purpose of ascertaining compliance" with a specific program's requirements. Often the specific statute goes on to state that "no person may refuse entry or access to any authorized representative of the department who requests entry for purposes of inspection" or "obstruct, hamper or interfere with any such inspection" [e.g., s. 285.19, Wis. Stats. - air contaminant source inspections]. Some of the provisions contain language which restrict the Department's inspections to "reasonable times" or "reasonable hours."

In addition to these specific statutory authorities for Department staff to conduct inspections on private properties, the Department also has oversight authority over other programs which are administered by local units of government (e.g., floodplain and shoreland programs). The Department's oversight authority generally includes the authority to determine whether the local programs are being complied with and to initiate enforcement actions against violators of the local programs. Such oversight authority implies that the Department staff have authority to inspect private properties to determine whether compliance is occurring. However, as noted below, inspections of private property by Department staff in the course of exercising their program responsibilities should generally be conducted only after notifying the owner or occupant of the private property and obtaining consent to the inspection.

### **Constitutional Constraints**

Although the statutes appear on their face to grant Department staff sufficient authority to enter private property for inspection purposes, both the United States Constitution (Fourth Amendment) and the Wisconsin Constitution (Article 1, Section 11) prohibit "unreasonable searches." Before a government employee can legally conduct an inspection under a statutory inspection authority, the government employee must have: (1) consent of the property owner or occupant; (2) a judicially-issued warrant (in these situations, a special inspection warrant); or (3) a case-law exemption---for example, a pervasively regulated industry (e.g., firearms or liquor sales) or where there is an emergency that would jeopardize public health or safety or the environment if there is not an immediate inspection.

### **Impact of "New" Trespass Law on DNR Inspections**

The relationship between the "new" trespass law and the Department's authority to conduct inspections under program-specific statutory authority is, not entirely clear at this time. What is clear is that:

- the "new" trespass law substantially broadens the actions which constitute a trespass;
- the "new" trespass law has 3 very limited, specific exceptions to actions defined as trespass;
- there is no specific statutory exception in the trespass law for entry on private property by public employees for the purpose of performing their official duties or functions (A bill [1997 Assembly Bill 2001] has been introduced to create such an exception.);
- the changes to the trespass law did not include any specific reference to or revise the specific statutory authorities under which the Department staff conduct inspections.

Until the relationship between the new trespass law and the Department's authority to enter private lands and conduct inspections is clarified (by statutory changes or litigation), the Department is not interested in "testing" the limits of the "new" trespass law or of directly subjecting Department staff to situations which might result in the issuance of a trespass citation. (Certainly, if in the context of conducting an inspection under specific statutory authority, a Department staff person is cited for a trespass violation, the existence of specific statutory authority would be an affirmative defense to a trespass violation.) In the interim, Department staff should adhere to the following guidelines in conducting inspections.

#### **Guidelines for Conducting Department Inspections on Private Property**

Although Department staff may be legitimately concerned about the potential of receiving a citation for trespass for conducting inspections on private property, the changes in trespass law are not likely to substantially change the way most DNR staff conduct their inspections. The following guidelines should minimize potential problems:

Department staff who conduct inspections on private property pursuant to specific statutory authority should carry a copy of the statutory provisions with them in the event their authority to conduct inspections on private property is challenged by the owner or occupant, of the property inspected.

In most instances, Department inspections can and should be conducted after notifying the property owner or occupant (and explicitly or implicitly securing his or her consent to the inspection).

If the inspection has not been scheduled in advance with the consent of the property owner or occupant, Department staff should attempt to identify the owner or occupant of the property to be inspected in advance of, or upon arrival at, the property and obtain the consent of property owner or occupant to conduct an inspection. (Showing the property owner or occupant a copy of the statutory authority for the Department to conduct the inspection will usually result in consent being given to enter and inspect the property.)

If consent to enter the property is refused, Department staff should seek a special inspection warrant under ss. 66.122 and 66.123, Wis. Stats., to inspect the property. Procedures for obtaining a special inspection warrant are outlined in Manual Code 4191.5.

If, during the course of conducting an inspection, the property owner or occupant notifies the Department staff that he or she is withdrawing consent to remain on the property, Department staff should leave the premises as requested. If further inspection of the property is required, Department staff should seek a special inspection warrant under ss. 66.122 and 66.123, Wis. Stats., for conducting the remainder of the inspection

In the event that the property owner or occupant cannot be located or cannot be contacted to provide consent, Department staff should consult with their supervisors and program attorney to determine whether and under what conditions an inspection may be conducted.

In addition, if the Department issues permits, licenses or approvals which may entail the Department staff conducting an inspection of the property to determine whether the permit, license or approval should be issued or whether the conditions of approval are complied with, the application forms for the permits, approvals or licenses should be modified to include a specific "consent" by the applicant to Department to conduct inspections of the property. In the interim, Department staff should follow the preceding guidelines for conducting site inspections on private properties which are subject to Department permits, licenses or approvals.

Following these guidelines should minimize any potential conflicts associated with the Department staff conducting authorized inspections, in light of the "new" trespass law. If there are additional questions about this guidance or questions about the interrelationship of DNR inspection authority and the "new" trespass law in

specific circumstances, DNR program staff should contact their supervisor and Bureau of Legal Services program attorneys for assistance.

Attachment

## **EXCERPTS FROM THE 'NEW' TRESPASS LAW**

**943.13 Trespass to land.** (1e) In this section:

\*\*\*\*\*

(d) **"Implied consent"** means conduct or words or both that imply that an owner or occupant of land has given consent to another person to enter the land.

\*\*\*\*\*

(e) **"Private property"** means real property that is not owned by the United States, this state or a local governmental unit.

(f) **"Undeveloped land"** means land that meets all of the following criteria:

1. The land is not occupied by a structure or improvement being used or occupied as a dwelling unit.
2. The land is not part of the curtilage, or is not lying in the immediate vicinity of a structure or improvement being used or occupied as a dwelling unit.
3. The land is not occupied by a public building.
4. The land is not occupied by a place of employment.

**(1m) Whoever does any of the following** is subject to a Class B Forfeiture [The penalty for a Class B forfeiture is a forfeiture not to exceed \$1,000]:

**(a) Enters any enclosed, cultivated or undeveloped land of another**, other than undeveloped land specified in par. (e) or (f), **without the express or implied consent of the owner or occupant.**

**(am) Enters any land of another that is occupied by a structure used for agricultural purposes, without the express or implied consent of the owner or occupant.**

**(b) Enters or remains on any land of another after having been notified by the owner or occupant not to enter or remain on the premises.**

\*\*\*\*\*

**(1 s) In determining whether a person has implied consent to enter the land of another** a trier of fact shall consider all of the circumstances existing at the time the person entered the land, including all of the following:

- (a) Whether the owner or occupant acquiesced to previous entries by the person or by other persons under similar circumstances.**
- (b) The customary use, if any, of the land by other persons.**
- (c) Whether the owner or occupant represented to the public that the land may be entered for particular purposes.**
- (d) The general arrangement or design of any improvements or structures on the land.**

**(2) A person has received notice from the owner or occupant** within the meaning of sub. (1 m)(b), (e) or (f) **if he or she has been notified personally, either orally or in writing or if the land is posted.** Land is considered to be posted under this subsection under either of the following procedures:

\*\*\*\*\*

**(3m) An owner or occupant may give express consent to enter or remain on the land for a specified purpose or subject to specified conditions and it is a violation of sub. (1m)(a) or (am) for a person who received that consent to enter or remain on the land for another purpose or contrary to the specified conditions.**

\*\*\*\*\*

(4m) This section does not apply to any of the following:

- (a) A person entering the land, other than the residence or other buildings or the curtilage of the residence or other building, of another for the purpose of removing a wild animal as authorized under s. 29.59(2), (3) or (4).
- (b) A hunter entering land that is required to be open for hunting under s. 29.59(4m) or 29.598(7m).

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